

In the Matter of the Medical Service of

**Rosewitha Cardenas, Claimant**

Contested Case No: 06-069H

**PROPOSED & FINAL ORDER**

August 9, 2006

ROSEWITHA CARDENAS, Petitioner

LIBERTY NW INSURANCE CORPORATION, Respondent

Before Darren L. Otto, Administrative Law Judge

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A hearing was convened and concluded in the above entitled matter on July 13, 2006 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by her attorney George Wall. The employer, Skyline NW Corp., and its insurer, Liberty NW Ins. Corp., were represented by their attorney Barbara Woodford. Exhibits 1 through 127 were received into evidence.

**ISSUES**

Claimant challenges a Workers' Compensation Division's (WCD) April 5, 2006 Administrative Order which found that a proposed repeat lumbar decompression surgery at L3-4 and fusion extension continued to be inappropriate for claimant's compensable condition. The issue is whether the WCD's Order was not supported by substantial evidence in the record or was based on errors of law.

**FINDINGS OF FACT**

Claimant was approximately 50 years old at the time of hearing (Ex. 1). On July 18, 1988, she was lifting a big box into a van at work and injured her low back (Exs. 1 & 3-1). Initially, the insurer accepted a lumbar strain (Ex. 62-2).

On July 25, 1988, claimant sought medical treatment for low back pain from Carl Erickson, D.O. who prescribed conservative care (Ex. 9). Claimant's low back pain persisted, however, and during the next six years she underwent five different low back surgeries (Exs. 15, 20, 23, 29 & 45). Lawrence Franks, M.D., performed all of those surgeries which consisted of discectomies, foraminotomies, removal of bulging scar tissue, and finally on March 29, 1994, a fusion at L4-5. *Id.* Claimant's symptoms did not improve following any of those surgeries (Exs. 66, 77 & 85).

On May 7, 1997, claimant entered into a Claim Disposition Agreement regarding her accepted lumbar strain whereby she gave up all of her rights regarding the workers' compensation claim except for continuing medical benefits (Ex. 62).

In the summer of 2002, claimant experienced a significant increase in her low back and leg pain (Exs. 70 & 85-2). She returned to her family physician, Craig Redfern, D.O., who prescribed pain medications. *Id.* By April 2003, claimant's symptoms consisted of low back pain with bilateral buttock, posterior thigh, and calf pain radiating to the level of the feet (Ex. 77-

5). She was also experiencing numbness in the calves bilaterally and occasional paresthesias bilaterally. *Id.* On April 5, 2003, claimant was examined by the insurer-arranged medical examiner Thomas J. Rosenbaum, M.D., who diagnosed degenerative osteoarthritis of the lumbar spine at L3-4 and L5-S1 and spinal stenosis at L3-4 (Ex. 77-6). Claimant's attending physician, Timothy Treible, M.D., agreed that claimant had stenosis at L3-4 which he felt was the result of the L4-5 fusion (Ex. 79). On September 24, 2003, the insurer-arranged medical examiner John Swanson, M.D., agreed with Dr. Treible that the fusion was the major contributing cause of claimant's L3-4 stenosis (Ex. 85-27). Thus, on October 8, 2003, the insurer modified its Notice of Acceptance to include claimant's lumbar strain and L3-4 spinal stenosis as a disabling industrial injury (Ex. 86).

On December 30, 2003, Dr. Treible requested authorization from the insurer to perform a repeat lumbar decompression at L3-4 and fusion extension and hardware removal (Ex. 91).

On May 27, 2004, claimant was examined by Michael L. S. Liu, M.D., who found no evidence of clinical radiculopathy, claudication, or progressive neurological deficits. Therefore, Dr. Liu believed that claimant's clinical and objective findings did not support Dr. Treible's surgical request. *Id.*

On July 1, 2004, the WCD issued an Administrative Order finding that the proposed surgery was not appropriate because claimant's symptoms were not consistent with spinal stenosis, she exhibited symptoms magnification on examination, her subjective presentation outweighed any objective abnormalities, and the previous five surgeries did not provide her with any symptom relief (Ex. 99, pgs. 5-6).

On November 17, 2005, Dr. Treible again requested authorization to perform the repeat decompression at L3-4 and possible fusion (Ex. 108). Dr. Treible, however, did not state that claimant's condition had changed or worsened since the previous request for surgical authorization in December 2003 (Ex. 103).

Dr. Rosenbaum examined claimant on December 16, 2005 and concluded that her situation was almost identical to what it was three years earlier (Ex. 111-7). He did not believe that claimant had shown any change in her condition during that period of time and surgery was not appropriate. *Id.* Drs. Treible and Redfern did not concur with Dr. Rosenbaum's findings and conclusions regarding the necessity of surgery but neither of them stated that her condition had changed since the December 2003 surgery request (Exs. 112 & 113).

On April 5, 2006, the WCD issued an Administrative Order finding that the repeat lumbar decompression at L3-4 and fusion extension continued to be inappropriate for claimant's compensable condition because there was no evidence of any objective changes in claimant's condition since the July 1, 2004 Administrative Order (Ex. 125-7).

### **FINDINGS OF ULTIMATE FACT**

Claimant's low back condition did not change or worsen after the December 2003 surgery request.

## CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the WCD's Order finding the proposed surgery inappropriate was not supported by substantial evidence in the record and was the result of an error of law. Specifically, claimant contends that the WCD did not give the necessary weight to her attending physician, and changes in her x-rays along with her decreased ability to walk were not taken into account in determining whether there had been a change in her condition since December 2003. The employer asserts that the only question is whether the WCD's Order was supported by substantial evidence in the record and the great weight of the evidence established that claimant's condition did not change after December 2003.

ORS 656.327(1)(a) provides that the Director of the WCD has jurisdiction to review whether medical treatment "that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services." If the worker or the employer disagrees with the WCD's decision, it may be appealed to the Workers' Compensation Board. OAR 436-001-0225, however, limits the scope of review of a WCD Administrative Order under those circumstances. The rule states, in relevant part,

(2) In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

On December 30, 2003, Dr. Treible requested authorization to perform a repeat lumbar decompression at L3-4 and fusion extension and hardware removal (Ex. 91). On July 1, 2004, the WCD issued an Administrative Order finding that the proposed surgery was not appropriate (Ex. 99). That decision was based on a variety of reasons including (1) Claimant's symptoms were not consistent with spinal stenosis and spinal stenosis noted on imaging studies only did not indicate surgery was warranted, (2) Claimant's clinical presentation and objective findings did not support the proposed surgery because she demonstrated evidence of symptom magnification and her subjective presentation outweighed any objective abnormalities, and (3) The previous five surgeries did not provide any lasting relief. (Ex. 99-5).

On November 17, 2005, Dr. Treible requested authorization to perform the same surgery which the WCD found inappropriate on July 1, 2004 (Ex. 68). The WCD concluded that the threshold issue was whether there had been a sufficient change in the clinical picture to warrant the disputed surgery (Ex. 125-7). Finding no evidence of any objective changes in claimant's low back condition since the July 1, 2004 Administrative Order, the Director found the disputed repeat lumbar decompression at L3-4 and fusion extension to be inappropriate for claimant's compensable condition (Ex. 125-7).

"In workers' compensation cases, when a claim for medical services is reasserted after being once denied, the question is whether the claimant's condition has changed so as to have

created a new set of operative facts that previously could not have been litigated.” Liberty Northwest Ins. Corp. v. Bird, 99 Or App 560, 563 (1989) *citing* Argonaut Ins. Co. v. Rush, 98 Or App 730 (1989); Kepford v. Weyerhaeuser, 77 Or App 363, *rev den* 300 Or 722 (1986). Thus, the Director’s legal analysis was correct. Claimant must show that her current low back condition changed from her condition in December 2003 when Dr. Treible requested authorization to perform the surgery which the WCD subsequently denied on July 1, 2004. Also, the Director did not commit any errors of law by giving less weight to claimant’s attending physician than it should have pursuant to law. Greater or lesser weight may properly be given to the opinion of a treating physician depending on the record in each case. Dillon v. Whirlpool Corp., 172 Or App 484, 489 (2001).

None of the physicians who examined claimant after December 30, 2003 believed that her low back condition changed or worsened. On May 28, 2004, Dr. Liu found no evidence of clinical radiculopathy or claudication or progressive neurologic deficit and believed that the clinical and objective findings did not support surgery at that time (Ex. 98). On December 16, 2005, Dr. Rosenbaum found that “claimant’s situation [was] almost identical to three years previously. \*\*\*There has, in essence, been no alteration in her neurologic examination, symptomatology, treatment record, nor imaging studies.” (Ex. 111-7). Dr. Rosenbaum concluded that there was no objective worsening of her condition and surgery would not benefit her (Ex. 111-8). Although Drs. Treible and Redfern did not concur with those findings and conclusions, neither of them found that claimant’s condition had changed since December 2003 (Exs. 112, 113, 114 & 115). Contrary to claimant’s suggestion, Dr. Rosenbaum understood that claimant was not able to walk more than one city block (Ex. 111-4). Finally, no physician concluded that the April 20, 2005 x-rays of claimant’s low back established a change or worsening in her condition. Therefore, the WCD’s April 5, 2006 Administrative Order was supported by substantial evidence in the record and was not based on errors of law. It will be approved.

### **ORDER**

IT IS HEREBY ORDERED that the April 5, 2006 Administrative Order finding the proposed repeat decompression surgery at L3-4 and fusion extension inappropriate is approved.